



California Fair Political Practices Commission

September 12, 1989

David B. Cosgrove
Rutan and Tucker
Central Bank Tower, Suite 1400
South Coast Plaza Town Center
611 Anton Blvd.
P.O. Box 1950
Costa Mesa, CA 92628-1950

Re: Your Request for Informal Assistance
Our File No. I-89-438

Dear Mr. Cosgrove:

This is in response to your letter requesting advice on behalf of the city council of Signal Hill concerning their duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ You have specifically requested informal assistance with respect to hypothetical questions that concern the procedure for legally required participation.² While we can provide some general guidelines for your information, please be aware that the questions you have presented and the answers provided in this letter are necessarily fact dependent. Because we do not have sufficient information about the specific nature of the decisions or the financial interests involved, these answers are tentative at best.

QUESTIONS

May the city council conduct a new drawing of lots to determine which disqualified member is legally required to participate with respect to the following decisions concerning a single subdivision: (1) A zoning amendment; (2) A subdivision map; (3) The determination of the location of a street realignment which was approved by the council as a condition to the approval

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

of the subdivision; (4) The vacation of the right-of-way for the old alignment.

CONCLUSIONS

1. The Zoning Decision: Where the decision returns to the city council unchanged and there has been no change in the financial interests of the councilmembers, the councilmember who is selected by random means to participate in the first vote on the decision should also participate in the subsequent votes on the same matter.

2. The Subdivision Map: The decision concerning the subdivision map appears to be distinct from either the general plan or zoning decisions, and consequently, a new drawing is permitted, but not required.

3. The Street Realignment: Where there are changed circumstances, which alter the conclusion as to the disqualification of any councilmember, a new situation exists requiring a new drawing by lot. However, even assuming the same councilmembers will be disqualified, it would appear that the street alignment decision is a separate decision for both the purposes of determining whether there is a conflict of interest and the implementation of legally required participation.

4. The Vacation of The Right-of-Way: The vacation of the right-of-way appears to be a separable decision both for the purpose of the conflict-of-interest analysis and the implementation of legally required participation.

FACTS

You have posed the following hypothetical. The city council of Signal Hill will be considering a proposed development. The decisions concerning the development include whether to: amend the general plan, change the zoning designation for the site, approve the subdivision map, realign a street adjacent to the development and vacate any excess rights-of-way. The general plan amendment and zoning amendment are presented to the city council. Three of the five councilmembers are disqualified due to financial interests that will be materially affected by the decisions.³ Lots are drawn to determine who is legally required to participate. One disqualified councilmember is selected to participate with the two remaining disinterested councilmembers.

³ It was unclear from your letter whether the councilmembers were disqualified as to the general plan amendment, the zoning decision or both. For the purposes of this response we assume that the councilmembers were in fact disqualified as to both decisions and that the drawing of lots was to choose a disqualified member to participate in both decisions.

The general plan amendment is approved. The zoning amendment, however, is continued to the next meeting.

In the context of this hypothetical background, you have asked us to determine the types of decisions in which the city council may choose to conduct a new drawing of lots to determine which disqualified member is legally required to participate.

ANALYSIS

As was discussed in our previous letter to you (Cosgrove Advice Letter, No. A-89-120, copy enclosed), Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

However, Section 87101 provides a limited exception where the official's participation is legally required:

Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made.

Section 87101.

This exception has been narrowly interpreted to permit the participation of the fewest financially interested persons possible in any decision. (In re Hudson (1978) 4 FPPC Ops. 13; Hill Advice Letter, No. I-89-160, copies enclosed.) Consequently, Regulation 18701 (copy enclosed) provides in pertinent part:

(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

* * *

(c) This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Government Code Section 87100, to vote to break a tie.

(2) Not be construed to allow a member of any public agency, who is otherwise

disqualified under Government Code Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Government Code Section 87100, whether or not such other members are actually present at the time of the disqualification.

Thus, where only a single member is needed to make a quorum, only one disqualified member is permitted to participate in the decision. (Skousen Advice Letter, No. A-88-162; Martin Advice Letter, No. I-88-375, copies enclosed.) This is because "... the purposes of the Act are best served by a rule which minimizes participation in government decisions by officials with a conflict of interest." (In re Hudson, supra.)

The question you have presented is what constitutes a decision for the purposes of legally required participation. You have asked a series of questions as to when a subsequent decision is in fact a new decision for which a new disqualified member may be selected to participate. Please be aware that the more critical issue in each of the hypotheticals is whether in fact the same councilmembers are disqualified as to each specific decision. Where a majority is not disqualified, none of the councilmembers is legally required to participate.

In addition, we wish to emphasize that you have asked us to assume that the disqualified councilmembers wish to participate in the decisions in question as much as possible. Therefore, your question is whether treating the various decisions as separate decisions, and drawing lots for each, is permitted. We emphasize that the city council is not required to repeatedly reselect the participants in a series of related decisions. (Hopkins Advice Letter, No. A-82-088, copy enclosed.) This letter should be interpreted as a discussion of the various options available to the city council under the facts you present.

The Zoning Amendment

In regard to the zoning decision, we have assumed that the decision returns to the city council unchanged and that there has been no change in the financial interests of the councilmembers that initially caused the disqualification. Under almost identical circumstances, we concluded that "the council could utilize the same drawing by lot, since the decision is really a continuation of the same issue." (Hopkins, supra.) This conclusion is consistent with the rationale that the fewest financially interested persons possible should be permitted to participate in any single governmental decision. (In re Hudson, supra.)

You have asked whether under these circumstances the city council could still choose to have a new drawing. In the Hill Advice Letter (No. A-87-110, copy enclosed), the Los Gatos City Council was confronted with a similar situation. The city council

needed four votes of the five person city council to enact an ordinance. However, two members were disqualified. A coin was tossed to determine which councilmember should participate and one of the councilmembers was selected. The vote was three to one and the ordinance did not pass. The majority of the city council then voted for reconsideration.

In this context, we stated: "In the future, it would be improper to repeat the random selection procedure with respect to the decision merely because the council has voted for reconsideration. The subject matter of the decision is unchanged, as are the disqualifying interests. Therefore, the councilmember who is selected by random means to participate in the first vote on the decision also is selected to participate in subsequent votes on the same matter."

Thus, under the facts you have presented, a new drawing to determine which disqualified councilmember may participate in the decision would be improper.⁴

The Subdivision Map

Without more information about the specific subdivision decision, it is impossible to provide definitive guidelines. Generally, however, each decision must be analyzed independently to determine if there will be a foreseeable material financial effect on the councilmember's real property.⁵ (In re Owen (1976) 2 FPPC Ops. 77, copy enclosed.) General plan amendments and a proposed subdivision map are apparently separate decisions that would have differing impacts on the property in and around the proposed development. As independent decisions, it is not certain that the same councilmembers will be disqualified for each.

Thus, absent facts that show these decisions are in some way interdependent, the decisions would be separately analyzed to determine the foreseeability and materiality of the financial effect of their decision on a public official's property. If the same members are not disqualified, a new drawing is required. However, even assuming that the same persons are in fact disqualified, it would appear that the subdivision map decision is distinct from either the general plan or zoning decisions, and consequently, a new drawing would be permitted.

⁴ In contrast, if only the general plan amendment was dealt with in the initial meeting and the zoning decision was considered for the first time in the subsequent meeting, the decision on the zoning change appears to be a different decision for which a new drawing is permitted.

⁵ Under some circumstances, however, the decisions may be too interdependent to be considered separately. (Miller Advice Letter, No. A-82-119, copy enclosed.)

The Street Realignment

You have asked whether a decision on how to realign a street is a separate decision for the purposes of legally required participation. However, again we must caution you that the first determination that must be made is whether in fact the same persons are disqualified. This cannot be assumed in making the actual determination as to whether legally required participation is even necessary.

For example, assume that councilmember X owns real property 299 feet south of the proposed subdivision and the subdivision is 500 feet across. Just 10 feet north of the development is the road to be realigned. With respect to the subdivision, councilmember X is within 300 feet and has a conflict of interest unless he can show no financial effect on his property. (Regulation 18702.3(a)(1), copy enclosed.) With respect to the street, however, councilmember X is over 800 feet away and probably would not have a conflict of interest unless the decision would have a reasonably foreseeable effect of \$10,000 on the fair market value of his property or will affect the rental value of the property by \$1,000 or more in a 12 month period. (Regulation 18702.3(a)(3).)

As stated above, where there are changed circumstances (either as to their personal financial interests or as to the proposed ordinance) which alter the conclusion as to disqualification of any councilmember, then a new situation exists requiring a fresh look at the situation and, if appropriate, a new drawing by lot. (Hopkins Advice Letter, supra.) But again, even if we assume the same councilmembers will be disqualified, it would appear that the street alignment decision is a separate decision for both the purposes of determining whether there is a conflict of interest and legally required participation.

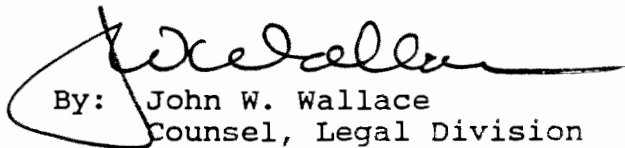
The Vacation of the Right-of-Way For The Old Alignment

While the vacation of a right-of-way involves the same property that is involved in the initial decision to realign the street, it too would appear to be a separable decision both for the purpose of the conflict-of-interest analysis and the implementation of legally required participation.

I trust that this answers your questions. If you should have any questions regarding specific decision, please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh
Enclosures

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July 20, 1989

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*A PROFESSIONAL CORPORATION

Mr. John Wallace
Fair Political Practices Commission
P.O. Box 807
Sacramento, CA 95804-0807

Re: Procedural Questions Regarding Administration of the Hudson
Opinion

Dear Mr. Wallace:

As you may recall, some weeks ago I conferred with you telephonically on questions arising out of the proper method of administering the random selection of disqualified council members on certain development proposals in the City of Signal Hill. This random selection has been undertaken in compliance with the Commission's advice in the Hudson Opinion, 4 FPPC Op. 13 (77-007, February 7, 1978). In Hudson, the Commission stated that if the number of disqualified council members on a given decision left the remaining body with less than a quorum, the decision making body must randomly select otherwise disqualified members until the minimum quorum is achieved.

This letter is sent to request written, informal advice on this procedure. My question arises when a decision upon which a majority of the council is disqualified involves a series of distinct but related decisions. In this case, may the council conduct an independent random selection each time a component decision comes before it, or does the first selection process set a "decision making panel" which is then fixed for all of the component issues?

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ATTORNEYS AT LAW

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Mr. John Wallace
July 20, 1989
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This issue stems from a pending development proposal in the City. The project is a 50 unit single-family residential development, which involves a general plan amendment, zoning amendment, subdivision map approval, realignment of a street adjacent to the development site, and vacation of any excess rights of way. Please assume for the purposes of the question that three of the five council members have a disqualifying material financial interest, and that these interests remain unchanged throughout the deliberation periods on all component decisions. Assume further that initially, the general plan amendment and zoning amendment are presented to the council together. Lots are drawn, and an interested member is selected to participate. The council approves the general plan amendment but continues the zoning amendment to a subsequent meeting.

When the zoning amendment returns for decision, can the City Council draw new lots to determine participation? Similarly, when the subdivision map is presented several months later, may new lots be drawn, or are the participating members for the subdivision map controlled by either or both of the prior drawings?

Please assume further that the subdivision map is approved and is subject to a condition that a street adjacent to the development site be realigned. Subsequently, the issue of determining the precise location of the street alignment is presented to council. Does this present a situation where new lots may be drawn? Further, if a public hearing is noticed and held at a subsequent meeting on vacation of the right-of-way for the old alignment, may lots again be drawn for this decision?

In sum, I wish for you to opine whether it is discretionary with the City Council to initiate a new random selection process on each individual, distinct decision which is a component of a larger, overall project, or whether a prior selection controls for all.

As a result of our previous telephone conversation, you graciously forwarded to me the Hopkins informal advice letter dated January 29, 1982. In that letter, the City of Anaheim requested advice on whether a prior drawing could be relied upon in subsequent proceedings, after the issue had been referred to a committee for study. The Commission concluded:

"Assuming that the same three council members are required to disqualify themselves due to conflicts of interest as to consideration of the same (or very similar) proposal, then the council

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We have further received your informal advice letter dated May 8, 1987 to Preston Hill (A-87-110) wherein you concluded that if the subject matter and disqualifying interests are unchanged:

"In the future, it would be improper to repeat the random selection procedure with respect to the decision merely because the council has voted for reconsideration." (Emphasis added.)

I understand that if the factual circumstances surrounding the two decisions are sufficiently similar, a prior drawing may fix the persons who may participate in subsequent proceedings. My question is, must it? If the council is so inclined, may it opt to draw lots again, possibly resulting in a different outcome and a different alignment of participating council members? I realize this would not be permitted if the issue is merely a vote for reconsideration. Otherwise, parties could continually bring motions to reconsider merely to allow a redrawing of lots. In the scenario I pose the issues are distinct although related. It is the Council's desire that lots be redrawn whenever possible.

I understand that this letter poses certain hypothetical circumstances, and because of this you will only be able to render informal advice. Nevertheless, we would appreciate some sort of factual analysis, and not simply a recitation of statutory standards, about which the council is now thoroughly familiar. Your assistance in this matter is greatly appreciated.

Very truly yours,

RUTAN & TUCKER



David B. Cosgrove
Assistant City Attorney
City of Signal Hill

DBC:jl

cc: Honorable Mayor Williams and
Members of the City Council
David J. Aleshire, City Attorney

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RUTAN & TUCKER



David B. Cosgrove
Assistant City Attorney
City of Signal Hill

DBC:jl

cc: Honorable Mayor Williams and
Members of the City Council
David J. Aleshire, City Attorney



California Fair Political Practices Commission

July 26, 1989

David B. Cosgrove
Assistant City Attorney
Signal Hill
P.O. Box 1950
Costa Mesa, CA 92626-9990

Re: Letter No. 89-438

Dear Mr. Cosgrove:

Your letter requesting advice under the Political Reform Act was received on July 25, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John Wallace an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan
General Counsel

KED:plh